

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in May 2008

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX

DEPARTMENT OF EDUCATION EMPLOYEES

KEYWORDS: SELECTION; ARBITRARY AND CAPRICIOUS; DISCRIMINATION; FAVORITISM; RACE

CASE STYLE: JOYNER v. DEPARTMENT OF EDUCATION/CEDAR LAKES
DOCKET NO. 07-DOE-122 (5/16/2008)

PRIMARY ISSUES: Whether Grievant should have been selected for a Cook III/Custodian III/Handyman position at Cedar Lakes Conference Center?

SUMMARY: Grievant challenged the selection of another applicant for a Cook III/Custodian III/Handyman position for which he applied. He contended he was the most qualified applicant, that the selection process was unfair, and that it was based on favoritism and discrimination.

Evidence established that a 3-person interview committee asked each applicant identical questions and scored their answers, resulting in the successful applicant being rated the highest by all committee members. Grievant failed to prove that the process or the selection decision was arbitrary and capricious or the result of discrimination or favoritism. Grievance DENIED.

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HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	CLEAR AND CONVINCING; CLEARLY WRONG; CONTRARY TO LAW; AT WILL; YEAR TO YEAR; ADMINISTRATIVE APPOINTMENT
<u>CASE STYLE:</u>	<u>SELLERS v. WEST VIRGINIA UNIVERSITY - PARKERSBURG</u> DOCKET NO. 06-HE-276D (5/30/2008)
<u>PRIMARY ISSUES:</u>	Clear and convincing evidence on default remedy; whether remedy contrary to law or clearly wrong; rebuttal of presumption on merits.
<u>SUMMARY:</u>	Following a decision by the Grievance Board that the Grievant had prevailed below by default, the grievance returned to Level Four for a decision whether the Grievant was entitled to the remedy she sought, continuation in her year-to-year position as Chairperson of the WVU-P Health Sciences Division. The Respondent established by clear and convincing evidence that the Grievant possessed only a year-to-year contract as Chairperson, terminable at Respondent's will on any annual anniversary. The remedy Grievant sought is clearly wrong and contrary to law, because it would convert an administrative position, terminable by its express terms, into what would amount to a tenured chairmanship. The Respondent has satisfied the heightened burden imposed on a defaulting employer, and the grievance must therefore be DENIED.

KEYWORDS: DISMISSAL; INSUBORDINATION; GROSS MISCONDUCT; CREDIBILITY; PROFANITY; STRIKING OR HITTING SUPERVISOR WITH A TRUCK; RECKLESS ACTION; CARELESS ACTION; RECKLESS DISREGARD; SAFETY

CASE STYLE: SCARBERRY v. MARSHALL UNIVERSITY

DOCKET NO. 2008-0303-MU (5/5/2008)

PRIMARY ISSUES: Whether Respondent proved Grievant hit her supervisor with a dump truck.

SUMMARY: Grievant was dismissed from her employment with Marshall for several acts of insubordination on August 8, 2007, and for deliberately hitting her supervisor with the side of a dump truck that same day. Grievant's supervisor was not injured. He was able to step back from the moving vehicle quickly enough that only his shirt suffered any damage. Grievant denied hitting her supervisor with the vehicle. Grievant was insubordinate on more than one occasion on August 8, 2007, she used profanity in the Marshall Student Center on that date, in the presence of students and parents, and she operated the dump truck with reckless disregard for the safety of her supervisor, clipping him with the dump truck. Grievance DENIED.

KEYWORDS: MISCLASSIFICATION; DUTIES; BACK PAY

CASE STYLE: WEBER v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 07-HE-159 (5/16/2008)

PRIMARY ISSUES: Whether Grievant was properly classified prior to her reclassification, and whether she was entitled to back pay.

SUMMARY: Grievant did not challenge any point factors. She argued she obviously was misclassified prior to August 1, 2006, when she was reclassified as a Trades Specialist I, pay grade 13, because her duties were the same as they were when she was classified as a Painter, pay grade 12, and she was entitled to back pay from the time she filed her grievance in April 2006, until she was reclassified August 1, 2006. However, the evidence was that effective August 1, 2006, Grievant did, in fact, assume new masonry duties, and it was the addition of these duties which resulted in the reclassification. Grievant also argued she had been working side by side with other Painters who were in a higher pay grade, and since she was painting too, she should have always been in a higher pay grade. The evidence was that Grievant had worked with Trades Specialists who were painting. Further, the remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. Grievance DENIED.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	REPRIMAND; PROFANITY; INAPPROPRIATE LANGUAGE; INSUBORDINATION; DUE PROCESS; FREE SPEECH
<u>CASE STYLE:</u>	<u>SHOWALTER v. MARSHALL COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-25-165 (5/28/2008)
<u>PRIMARY ISSUES:</u>	Whether it was appropriate for Grievant to receive a written reprimand for using profanity during a conversation with another teacher?
<u>SUMMARY:</u>	Grievant received a written reprimand for using profanity during a conversation with another teacher, stating that a particular student could not "f***ing read." □ As previously held by the Grievance Board, the use of profanity by school personnel in the school setting violates the Employee Code of Conduct and constitutes insubordination. Grievant had previously been warned against the use of such language, also making the conduct clearly insubordinate. She failed to establish a violation of her free speech rights, and due process was not implicated in a situation where she was reprimanded, resulting in no deprivation of employment, wages, or benefits. The grievance is denied.

<u>KEYWORDS:</u>	UNIFORMITY; SALARY SUPPLEMENT; LIKE ASSIGNMENTS; SIMILARLY SITUATED
<u>CASE STYLE:</u>	<u>CRAWFORD, ET AL. v. MONROE COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-31-338 (5/16/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievants were entitled to the same salary supplement given to teachers who undertake to provide Advanced Placement courses.
<u>SUMMARY:</u>	The only issue presented is whether Grievants should receive the salary supplement given to teachers that provide Advanced Placement courses. Grievants argue that they perform the same activities in providing dual credit courses to students as do teachers who provide AP courses. Grievants are not paid a supplemental salary for providing dual credit courses and assert this results in a violation of W. Va. Code § 18A-4-5b. Grievants failed to show that the Mercer County Board of Education engaged in a statutory violation, or that they were otherwise entitled to the salary supplement paid to teachers of AP courses. Grievance DENIED.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	COMPENSATION; PRINCIPAL WORK ACTIVITY; FLSA; ULTRA VIRES; COMPENSABLE WORK TIME
<u>CASE STYLE:</u>	<u>WINE v. PRESTON COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-39-358 (5/5/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to compensation for time spent riding a school bus before and after her assigned student was present?
<u>SUMMARY:</u>	In February of 2007, BOE discontinued payment to transportation aides for time spent on school buses without assigned students present. Grievant contends that this violates the Fair Labor Standards Act, because she was told by a school principal to board the bus at a specific school, and she believes she should have continued to receive payment for all time spent riding the bus. Pursuant to the FLSA and past legal decisions, riding a bus is a preliminary and postliminary activity for an aide, and it is not compensable work time. Grievance DENIED.

KEYWORDS:

EXTRACURRICULAR ASSIGNMENT; NOTICE; LACK OF NEED; MITIGATION; MULTIPLE BUS RUNS; BACK PAY; RELIEF

CASE STYLE:

POWROZNIK-HESS v. MONONGALIA COUNTY BOARD OF EDUCATION

DOCKET NO. 07-30-108 (5/29/2008)

PRIMARY ISSUES:

Whether Grievant was entitled to back pay for the school year when she did not receive the statutory notice of termination of her extracurricular assignment.

SUMMARY:

During the 2005-2006 school year, Grievant held an extracurricular bus run, commonly referred to as "the Shack run." Grievant was informed on September 13, 2006, that this run would not be needed for the 2006-2007 school year. She did not receive notice during the Spring of 2006 that this run would not be needed, as is required by statute. The level two decision awarded Grievant four days of back pay, but did not award her any back pay beyond October 1, 2006, because Grievant had bid on, and began working in, another extracurricular assignment on October 2, 2006. Respondent argued that Grievant had mitigated the damages when she began working in this assignment on October 2, 2006, and it was not required to pay her more than the four days of back pay awarded at level two, and paid. Grievant could have performed the Shack run and the run she was awarded beginning October 2, 2006. Grievant is entitled to back pay for the remainder of the 2006-2007 school year. Grievance GRANTED.

<u>KEYWORDS:</u>	OVERTIME; EXTRACURRICULAR ASSIGNMENT; MONETARY AWARD; SERVICE PERSONNEL; SENIORITY
<u>CASE STYLE:</u>	<u>GOINS v. RALEIGH COUNTY BOARD OF EDUCATION</u> DOCKET NO. 07-41-113 (5/30/2008)
<u>PRIMARY ISSUES:</u>	Whether Grievant was entitled to a monetary award to compensate her for overtime that was earned by another employee for a position that Grievant might have occupied had the position been posted.
<u>SUMMARY:</u>	<p>Grievant is employed by Respondent as a Payroll Supervisor/Secretary 3/Accountant 3. In the Fall of 2005, Judy Chapman, a Secretary 3 employed in Respondent's central office, began performing record keeping duties for the staff development council. Ms. Chapman was provided with a computer and printer to use at home to perform the work. Ms. Chapman was compensated for her time working on this project. Grievant learned of this assignment and initiated a grievance. The position formerly performed by Ms. Chapman was posted on January 22, 2007, and filled by an employee more senior than Grievant. Grievant seeks a monetary award for the time Ms. Chapman performed the assignment under the theory that she would have been the successful applicant for the position had it been posted in 2005. The Board failed to post the extracurricular assignment in a timely manner. Nevertheless, once the position was posted, the relief sought by Grievant on this issue was provided. An extracurricular position involving the duties in question was posted, and filled by a more senior employee holding the secretary classification. Grievant failed to prove by a preponderance of the evidence that she would have received an extracurricular contract for performing staff development support had such a position been posted in 2005. Grievance DENIED.</p>

KEYWORDS: RECLASSIFICATION; POSTING; STANDING

CASE STYLE: FLEMING, ET AL. v. FAYETTE COUNTY BOARD OF EDUCATION AND BRENDA JEFFRIES, INTERVENOR
DOCKET NO. 07-10-066 (5/8/2008)

PRIMARY ISSUES: Whether there was a violation of the posting requirement when a cook's position was reclassified in response to the way her job duties had changed due to the reconfiguration of her school.

SUMMARY: Grievants argue that Respondent promoted a co-worker to Cook III without proper posting. Respondent asserts that the position in question was reclassified in compliance with statutory regulations, when the duties of the individual had expanded over time. Based upon the unique facts of this grievance, this situation did not create any exception to the statutory posting requirement. Given that many other employees were qualified for this position, fairness dictates that the position be posted to allow the decision to be made on the basis of an employee's seniority, and evaluation of past service. However, Grievants failed to prove that they should be reclassified because their duties remain most closely aligned with their current classification. Grievance GRANTED, in part, and DENIED, in part.

KEYWORDS: SUSPENSION; DUE PROCESS

CASE STYLE: HAMMER v. GREENBRIER COUNTY BOARD OF EDUCATION
DOCKET NO. 2008-0302-GreED (5/21/2008)

PRIMARY ISSUES: Failure to provide due process before a suspension without pay requires that the grievance be granted. Accommodation of disability.

SUMMARY: Respondent's superintendent suspended the Grievant for one day without pay for failure to wear her bus operator's uniform, without informing her in advance that her suspension was proposed, without telling her in advance what the charges were, and without giving her a pre-suspension opportunity to respond to them. The Respondent school board later upheld the superintendent's action, following a hearing. The Grievant had a legitimate disability-related reason for not wearing the uniform provided by the Respondent, but the Respondent's failure to afford her pre-suspension due process requires that her grievance be granted, without relying on the merits of the case. If the merits were reached, the result would be the same, because the Respondent did not sufficiently accommodate the Grievant's disability. Grievance granted; suspension vacated.

KEYWORDS:

TERMINATION; INCOMPETENCY; FAVORITISM;
DISCRIMINATION; PHYSICAL; MEDICAL CONDITION

CASE STYLE:

DURST v. MASON COUNTY BOARD OF EDUCATION

DOCKET NO. 06-26-028R (5/30/2008)

PRIMARY ISSUES:

Was it proper for the BOE to terminate Grievant's employment, after he had exhausted all required leave and was still unable to work because of a medical condition?

SUMMARY:

Grievant's employment was terminated after he exhausted all accrued leave and exercised his rights to unpaid leave under the Family Medical Leave Act. Because Grievant was still unable to return to work, he was terminated due to physical incompetence to work. After this grievance was dismissed as being rendered moot because of Grievant's untimely death, the Circuit Court of Kanawha County, West Virginia, remanded the grievance for a determination upon the merits of Grievant's termination. Per the provisions of W. Va. Code § 18A-2-8 and prior cases, an employee may be terminated due to physical inability to work. The grievance is DENIED.

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STATE EMPLOYEES

<u>KEYWORDS:</u>	DECLARATORY; MOOT; GRIEVABLE ISSUE; RELIEF; REMEDY
<u>CASE STYLE:</u>	<u>PRITT, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL</u> DOCKET NO. 2008-0812-CONS (5/30/2008)
<u>PRIMARY ISSUES:</u>	Should the grievance be dismissed, because the requested remedy had been granted?
<u>SUMMARY:</u>	<p>Grievants are employed in the Admissions Office of Mildred Mitchell-Bateman Hospital. They initiated this grievance following the suspension of a co-worker, contending that they should not have been required to train three temporary employees who were placed in that position. As relief, Grievants requested that the position be filled permanently.</p> <p>Subsequent to the filing of this grievance at level two, Respondent filed a Motion to Dismiss, stating that the suspended employee had been terminated, his position had been posted, and interviews were being conducted to select a permanent employee to fill it. Grievants were given two opportunities to respond to the motion, spanning over two months, but filed no response. Because the requested relief has apparently been provided by the employer, this grievance has been rendered moot. Grievance DISMISSED.</p>

<u>KEYWORDS:</u>	DEFAULT; ISSUED; TRANSMITTED; FAX
<u>CASE STYLE:</u>	<u>SPRADLING v. DEPARTMENT OF REVENUE/STATE TAX DEPARTMENT</u> DOCKET NO. 07-TD-348DEF (5/12/2008)
<u>PRIMARY ISSUES:</u>	Whether a fax transmission of a level three decision on the final day for issuance resulted in default?
<u>SUMMARY:</u>	<p>Grievant alleged a default occurred when a the level three decision was faxed to her office on the fifth working day after the hearing. Pursuant to grievance statute and case precedent, a decision is considered timely issued if placed in the mail, or otherwise transmitted, to the grievant on or before the final day for issuance. Therefore, no default occurred under these circumstances. Default DENIED.</p>

KEYWORDS:

PROBATIONARY EMPLOYMENT; UNSATISFACTORY PERFORMANCE; DISCHARGE

CASE STYLE:

MURPHY v. PUBLIC SERVICE COMMISSION

DOCKET NO. 07-PSC-350 (5/16/2008)

PRIMARY ISSUES:

Whether the Grievant, who was dismissed during her probationary period for unsatisfactory performance, could establish that her performance was satisfactory and her dismissal was improper and/or discriminatory.

SUMMARY:

Respondent discharged Grievant during her probationary period of employment, citing unsatisfactory job performance. Grievant challenges her discharge and alleges that her work performance was affected by Respondent's discrimination and re-actions toward her stemming from her request for disability accommodations. Respondent identified specific work performance deficiencies of Grievant to substantiate its determination that Grievant's job performance was reasonably determined unsatisfactory. Identified shortcomings of Grievant during her probationary period included; (a) an inability to complete her work in a reasonable amount of time; (b) an inability to follow instructions; (c) failure to properly keep her supervisor informed; and (d) failure to adequately demonstrate the skills necessary to perform the job.

□ Grievant did not meet her burden of proof and demonstrate her job performance was satisfactory or establish a claim of discrimination. Grievant failed to prove violation of any statute, policy, rule, or regulation under the purview of the Public Employee's Grievance Board. Grievance DENIED.

<u>KEYWORDS:</u>	STANDING; DISCRETION; PAY INCREASE; GRIEVING FOR OTHER EMPLOYEES; GRIEVABLE
<u>CASE STYLE:</u>	<u>LUCAS, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES AND DIVISION OF PERSONNEL</u> DOCKET NO. 07-HHR-141 (5/14/2008)
<u>PRIMARY ISSUES:</u>	Whether the grievance stated a claim upon which relief could be granted.
<u>SUMMARY:</u>	Grievants had requested from HHR administrators an across the board salary increase for all employees in Berkeley, Jefferson, and Morgan counties, and the ability to hire above the base salary, due to the problems they were having hiring and retaining qualified staff in those three counties due to the cost of housing. This request was denied, and they filed this grievance, seeking as relief a \$7,000.00 pay increase for all HHR employees under their supervision, and for themselves, and the ability to hire new employees at a higher rate of pay. Respondents filed a Motion to Dismiss. Grievants do not have standing to grieve about how much another employee is paid. Further, the failure of HHR to approve the discretionary pay increase requested by Grievants is not grievable. Grievance DISMISSED.

KEYWORDS: SUSPENSION; DUE PROCESS; PROGRESSIVE DISCIPLINE; MITIGATION

CASE STYLE: GOLDSTEIN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT
DOCKET NO. 2008-1061-DHHR (5/23/2008)

PRIMARY ISSUES: Whether Grievant was properly suspended, and whether his due process rights were violated.

SUMMARY: Grievant is employed by the Bureau for Child Support Enforcement as a child advocate attorney. As part of his case assignments, Grievant appeared at a hearing in Summers County Family Court. During the proceedings, a party paying support raised an issue relating to a payment made in compliance with his child support obligation. The presiding Judge asked Grievant to go with her case coordinator to review computer records to ascertain the status of this payment. Grievant refused the Judge's directive, and replied it was not part of his job. A predetermination conference was conducted prior to the suspension. It was explained to Grievant that the Commissioner was considering taking disciplinary action against him for his inappropriate behavior. Grievant neither offered anything in defense of his actions, nor accepted responsibility for his misconduct as an officer of the court. The Commissioner suspended Grievant for one day based upon Grievant's offense to the court. In addition, her decision was supported by the fact that Grievant's actions did nothing to resolve the issue raised by a party to the proceeding. Respondent has proven the elements of the charge against Grievant by a preponderance of the evidence. Grievance DENIED.